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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ~~74~~-862

ROBERT R. KRILICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PRAYER

The Petitioner, Robert R. Krilich, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 30, 1974.

OPINION BELOW

The opinion of the Court of Appeals in the § 2255 proceeding, which is not yet reported, appears in Appendix "A" hereto. The opinion in the direct appeal appears in Appendix "C".

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 30, 1974. A timely Petition for Rehearing was denied on October 16, 1974, and this timely Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether retroactive effect should be given a decision of the Seventh Circuit, which immediately followed an adverse ruling by the same Court in petitioner's case, wherein the Seventh Circuit admitted it erroneously decided the same issue in petitioner's case.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Section 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a

substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

United States Code, Title 28:

Section 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the

judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE

The opinion of the Seventh Circuit very succinctly and accurately states the case presented. Therefore, relevant portions thereof will be stated verbatim:

"On June 6, 1971, petitioner-appellant was convicted of income tax evasion and of willfully filing a false income tax return in violation of 26 U.S.C. § 7201 and 26 U.S.C. § 7206(1), respectively. His conviction was subsequently affirmed by [the Seventh Circuit]. *United States* v. *Krilich*, 470 F. 2d 341 (7th Cir. 1972). (App. A14) Petitioner thereafter moved to vacate his conviction pursuant to 28 U.S.C. § 2255, asserting that, in the course of his trial, he was denied access to a report prepared by an Internal Revenue Agent who testified on behalf of the government, and that he was thereby denied his constitutional right of confrontation and effective assistance of counsel." (App. A1-2)

"In the course of petitioner's earlier appeal, he urged that his conviction be reversed because, prior to the cross examination of [the Special Agent], Krilich was not afforded access to the Special Agent's Report (SAR) which [the agent] prepared in connection with the government's investigation of petitioner. In affirming his conviction, * * * [the Seventh Circuit] ruled that the SAR was not "a 'statement' as defined in 18 U.S.C. § 3500(e), and hence was not producible under the Jencks Act." (App. A2)

"Subsequently, on April 16, 1973, this court decided *United States* v. *Cleveland*, 477 F. 2d 310 (7th Cir. 1973) (hereinafter, Cleveland I), holding that the SAR is a "statement" within the meaning of the Jencks Act, 18

U.S.C. § 3500(e). . . .'' In a footnote, the court observed that ''[t]his comment is, of course, also applicable to the dictum of *United States* v. *Krilich*, 470 F. 2d 341 (7th Cir. 1972, page 351, n. 18, . . .'' (App. A2-3)

The Court of Appeals properly recognized that the 2255 motion raised a constitutional claim, but held that its *Cleveland I* decision would be applied prospectively and should not be afforded retrospective application to petitioner's case.

''The fact that a motion under § 2255 raises a constitutional claim, however, does not necessarily mandate that the underlying conviction be vacated, even if the petitioner succeeds in establishing the claim asserted. The instant case represents one instance in which, even if the correctness of petitioner's contention were to be assumed, the claim that his underlying conviction should be vacated must be denied. *Cleveland I* clearly had the effect of changing what, in practice, had theretofore been a commonly accepted rule within this Circuit.'' (App. A5)

''Since Krilich's conviction preceded the *Cleveland* decision, his present effort to set aside that conviction requires us to consider whether *Cleveland I* should be afforded retroactive application. For the reasons herein stated, we find that *Cleveland I* should be applied prospectively only and, for this reason alone, affirm the decision of the district court.'' (App. A5)

REASON FOR GRANTING THE WRIT

Equitable Considerations Require That This Court Decide A Retroactive v. Prospective Application Question When A Circuit Court Of Appeals Acknowledges In A Decision Announcing A New Rule That It Erroneously Decided A Criminal Case Which Immediately Preceded The Correct Decision And Raised The Same Issue.

In petitioner's direct appeal one of the errors which he urged upon the Court of Appeals was that the trial court wrongfully denied him access to a report prepared by an Internal Revenue Service Special Agent who testified as a government witness at his trial. This Jencks Act issue was decided adversely to petitioner on November 28, 1972. However, on April 16, 1973, the Seventh Circuit in *United States* v. *Cleveland*, 477 F. 2d 310[1] decided the same issue which had been presented to it in petitioner's direct appeal in favor of defendant *Cleveland*.

In a footnote in the *Cleveland* opinion, the Seventh Circuit in referring to the Jencks Act issue, stated:

> "This comment is, of course, also applicable to the dictum in *United States* v. *Krilich*, 470 F. 2d 341 (7th Cir. 1972), page 351, n. 18, . . . This opinion has been circulated to all of the active members of the court. No judge has requested that the case be heard en banc." 477 F. 2d at 316.

Thus, the Court of Appeals clearly acknowledged that it had erred in deciding petitioner's direct appeal. However, it refused to correct this gross inequity in the col-

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1. *Cleveland* was argued January 8, 1973. Briefs were submitted prior to the release of the Krilich opinion.

lateral attack under 28 U.S.C. Section 2255. Instead, in its opinion, the Court determined the error would stand since in its view retroactivity was neither mandatory under the law as enunciated by this Court (App. A6-8) nor proper under the balancing tests set forth in *Johnson* v. *New Jersey*, 384 U.S. 719 (1961) and *Stovall* v. *Denno*, 388 U.S. 293 (1967).

The theory of retroactivity has been referred to as an "enigma wrapped in a mystery." *Vaccaro* v. *United States*, 461 F. 2d 626 (5th Cir., 1972).

> "Perhaps no other area of constitutional law is more enshrouded in puzzlement and apparent logical inconsistencies. . . . A catalog of some of the other retroactivity holdings demonstrates the perplexities. For example, while the right to counsel at a preliminary hearing where the defendant makes incriminating statements is retroactively recognized, the right to counsel during accusatorial police interrogation during which the accused makes incriminating statements is not retroactively enforced. Similarly, while the defendant's right to a fair, impartial and unbiased jury is retroactively effected, the right to an impartial judge may be given prospective application only. Likewise, the defendant is entitled to retroactive protection against the extra-judicial confessions of a co-defendant, but not of himself.
>
> Systematic exclusion of Blacks from juries calls for retroactive vindication, but systematic exclusion of women apparently does not. Newly announced standards for determining the voluntariness of confessions are retroactive, but newly announced standards for determining the voluntariness of guilty pleas are not.
>
> At the outset we recognize the impossibility of reconciling these apparent inconsistencies with any neatly constructed, logically appealing, symmetrically patterned theory or doctrine. The reason is that retroac-

> tivity is essentially a pragmatic, case-by-case, result oriented process whereby the often competing interests of society, the accused (or by now, the convicted) and the efficient administration of justice are balanced and weighed. There are no hard and fast rules, no shorthand formulae, in the retroactivity area — only factors, equities and considerations. Thus, what is dispositive of one case may be of little value in resolving any other retroactivity problem. The scales are sensitive with so much at stake, and the delicate balance shifts with each different set of facts and circumstances."
> *Vaccaro* v. *United States*, 461 F. 2d 628-629.

Petitioner finds himself in the unfortunate position of having been at the right place with the right law, but at the wrong time. This is a most perplexing and unjust situation which can only be rectified by giving the *Cleveland* decision retroactive application to petitioner's case. There was nothing that intervened between the time of petitioner's direct appeal and the Seventh Circuit's ruling in *Cleveland*. There were no other cases in the Seventh Circuit touching the underlying issue, nor did any other Circuit Court of Appeals or this Court issue any remotely related opinions. Clearly, petitioner was denied, both at his trial and in his direct appeal, his constitutionally guaranteed right of confrontation which is so imperative to a fair trial.

> "There are few subjects perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."
> *Pointer* v. *United States*, 380 U.S. 405 (1965).

The primary differences between the decision in petitioner's direct appeal and the *Cleveland* case are simply that of an accident of timing and a difference in judges on the respective panels. This is in itself "an enigma wrapped in a mystery." Certainly, the state of the law on the subject of "confrontation" had not changed and petitioner's direct appeal squarely presented the same issue. It is, therefore, incongruous that petitioner be denied the benefit of the holding in *Cleveland*. Under the circumstances presented, the Court of Appeals should have held retroactive application to petitioner's case was mandatory.

The Court of Appeals held, however, that retroactivity was not mandatory under *Williams* v. *United States*, 401 U.S. 653 (1969). This was bottomed on the conclusion that defense access to the SAR prior to cross-examination was not critical. (App. A8). Unfortunately, confrontation cannot be mathematically calculated — it is either constitutionally adequate or it is not. Confrontation through cross examination can never be adequate and productive of truth when the cross examiner has only partial knowledge of a given subject matter. Being armed in a hunt for the truth from an IRS Special Agent with less than complete facts is as meaningful as confronting a saber-tooth tiger with an empty gun. Adequate confrontation is precluded and the integrity of the truth determining process substantially impaired.

Assuming arguendo that retroactive application of *Cleveland I* is not deemed to be mandatory, it is respectfully urged that this Court exercise its supervisory power to require, based upon the balancing tests,[2] retroactive application to the date of petitioner's first trial or direct appeal. In this regard it is submitted that the equities of the case tip the balance in favor of retroactive application to petitioner's case.

The balancing test of paramount importance in this case is — "*[t]he effect on the administration of justice.*" — (App. A9) When weighed in the light of the actual number of cases affected, this case cries out for specific retroactive application.

The Court's attention is respectfully directed to the *Annual Report of Director of the Administrative Office of the United States Courts* (*table F-7*) for the appropriate periods. During the fiscal years ended June 30, 1971, June 30, 1972, and June 30, 1973, there were a total of 711 criminal appeals in the Seventh Circuit. Of these, only 31 were appeals from income tax trials. Petitioner's trial occurred during the fiscal year ending June 30, 1971, and his direct appeal during the fiscal year ending

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2. As to the two of the balancing tests applied by the Seventh Circuit, "*the purpose to be served by the new rule*," and "*the extent of reliance by law enforcement authorities on the old standard.*" (App. A9) Neither of these tests has much practical significance in this case. Reliance clearly was not detrimental to law enforcement authorities. The purpose to be served by the new standard is to comply with the constitutional mandates of confrontation and effective assistance of counsel.

June 30, 1973. The Court could apply *Cleveland I* retroactively to Krilich's appeal, thereby affecting a maximum of 14 cases. This figure is obviously inflated by those cases occurring before November 28, 1972 and after April 16, 1973, and for those cases which do not raise the 3500 issue.[3]

It is clear that there is no way on earth that this case could have the devastating effects on the administration of criminal justice that were referred to by this Honorable Court in *Storall* v. *Denno*, 388 U.S. 293, 300 and *Tehan* v. *United States, ex rel. Shott*, 382 U.S. 406, 419. Law enforcement would not be affected at any level and there are only a handful of cases involved.

What is involved, however, is much broader than simply granting relief to petitioner per se. The trust and confidence which all citizens of the United States repose in our judicial system will substantially diminish unless the gross inequity suffered by petitioner is rectified. We all know that part of the human experience is to err. The correction of mistakes is part of the living experience which must permeate not only business and social intercourse among the citizens of this country, but which must be an integral and ongoing process for a viable constitutional government. The mistake which occurred in petitioner's direct appeal must be corrected by retroactive application of *Cleveland* to petitioner's case.

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3. There were 14 criminal tax appeals in the fiscal year ending June 30, 1973, 10 for the fiscal year ending June 30, 1972, and 7 for the year ending June 30, 1971.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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